

Before The
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT ON CHANGES IN RETAIL HOURS

Docket No. C2014-1

UNITED STATES POSTAL SERVICE MOTION TO DISMISS
THE COMPLAINT ON CHANGES IN RETAIL HOURS

(May 20, 2014)

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On April 30, 2014, Mr. Douglas Carlson (Complainant) filed a complaint (Complaint) with the Postal Regulatory Commission (Commission) alleging violations of 39 U.S.C. § 3661 and the Postal Operations Manual (POM). Pursuant to 39 C.F.R. § 3030.12(b),¹ the United States Postal Service (Postal Service) hereby submits this motion to dismiss the Complaint (Motion). As set forth more fully below, the Commission should dismiss the Complaint with prejudice for failure to state a claim. In the alternative, the Commission should refer the Complaint to the rate and service inquiry process as it fails to satisfy any of the criteria in 39 C.F.R. § 3030.13 for treating an isolated incident affecting few mailers as a complaint rather than a rate or service inquiry.

Preliminary Statement

At its core, this Complaint is merely an attempt by a single individual to influence Postal Service operations in the San Francisco District in an effort to maintain evening retail window service at certain Postal Service operated locations.² Such a Complaint, even under the guise of other purported allegations, should not be entertained by the Commission.

The failure of Complainant to present valid claims for Commission review is highlighted by the Complaint's numerous jurisdictional, statutory, and regulatory deficiencies, all of which mandate dismissal by the Commission. First, Complainant presents untimely and unsupported claims regarding alleged violations of 39 U.S.C. §

¹ Pursuant to this rule, the Postal Service's Answer is deferred. If the Commission denies the Postal Service's motion or postpones disposition, the Postal Service's answer is due within 10 days of the Commission's action.

² As highlighted below, in the body of the Complaint, Complainant makes no allegation that he utilizes Postal Service retail services at any Postal Service facility in the San Francisco District. Complainant does, however, attach an exhibit to his Complaint which provides some insight regarding his potential concerns related to the adjustment in retail window hours.

3662. These claims fail to satisfy the Commission's pleading requirements and misstate the applicable law. As such, the Complaint does not present material issues of fact or law requiring review by the Commission. Complainant also fails to "[c]learly identify and explain" the applicable statutory violations related to his allegations that the Postal Service violated the POM as required by 39 C.F.R. § 3030.10(a)(2), which renders this claim invalid. Even when reading the Complaint in a manner most favorable to Complainant, the Complaint fails to provide a valid claim for relief related to any potential violation of the POM by the Postal Service.

Ultimately, the Complaint must be dismissed by the Commission based on Complainant's inability to present any issues of material fact or law that establish a claim upon which the Commission can grant relief.

Factual Background

On April 30, 2014, Complainant filed the Complaint with the Commission alleging violations of 39 U.S.C. § 3661(a) and (b) and violations of the POM.³ At its essence, the Complaint relates to the Postal Service's retail hour changes at certain locations in the San Francisco District and allegations that the Postal Service did not adequately and sufficiently consider the needs of the customers before or after notifying customers of the retail hour changes at affected retail facilities.⁴

On May 1, 2014, the Commission issued Order No. 2073, which determined that the Complaint included a Motion for Emergency Injunctive Relief (Emergency Motion) and established a deadline of May 7, 2014 for the submission of answers to the

³ Douglas F. Carlson, Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief (hereinafter "Complaint"), PRC Docket No. C2014-1 (April 30, 2014).

⁴ *Id.* ¶¶ 26-28.

Emergency Motion.⁵ Pursuant to PRC Order No. 2073 and 39 C.F.R. § 3001.21(b), on May 7, 2014, the Postal Service filed an Answer in Opposition to Motion for an Emergency Order.⁶ The Postal Service asserted that no statutory or regulatory basis for the emergency relief sought by Complainant exists; rather, applicable statutes and regulations limit the Commission's remedial authority to retrospective relief.⁷ Furthermore, even if preliminary injunctive relief were available, Complainant failed to establish entitlement to such relief.⁸

On May 8, 2014, Complainant filed a Notice of Filing of Corrected Exhibit 1 to Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief, in which he stated due to a production error, a letter, sent by Complainant via facsimile transmission to David B. Stowe, District Manager for the San Francisco District, was omitted from the Complaint filed on April 30, 2014.⁹ Accordingly, Complainant filed an erratum, which included the omitted letter.¹⁰ On May 13, 2014, the Postal Service filed a Notice of Filing Errata to Answer in Opposition to Motion for an Emergency Order and errata, which amended the Postal Service's Opposition in light of the omitted letter.¹¹

⁵ Order No. 2073, Order Setting Time to Answer Emergency Request for Injunctive Relief, PRC Docket No. C2014-1 (May 1, 2014).

⁶ United States Postal Service Answer in Opposition to Motion for an Emergency Order (hereinafter "Opposition"), PRC Docket No. C2014-1 (May 7, 2014).

⁷ *Id.* at 2-7.

⁸ *Id.* at 8-20.

⁹ Douglas F. Carlson, Notice of Filing of Corrected Exhibit 1 to Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief, PRC Docket No. C2014-1 (May 8, 2014).

¹⁰ Douglas F. Carlson, Complaint on Changes in Retail Hours and Emergency Request for Injunctive Relief [Erratum], PRC Docket No. C2014-1 (May 8, 2014).

¹¹ United States Postal Service Notice of Filing Errata to Answer in Opposition to Motion for an Emergency Order (hereinafter "Opposition Errata"), PRC Docket No. C2014-1 (May 13, 2014).

Argument

I. COMPLAINANT FAILS TO STATE ANY CLAIM UPON WHICH THE COMMISSION CAN ISSUE A REMEDY.

Complainant has failed to allege facts sufficient to support any of his allegations, thereby requiring dismissal of his Complaint. The Commission's rules require that a complainant set forth the facts and circumstances that give rise to the complaint and clearly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements.¹² These standards are similar to the Federal Rules of Civil Procedure, which require that a complainant provide a "short and plain statement of the claim showing that the pleader is entitled to relief."¹³ Further, federal courts are increasingly requiring more specific factual allegations when determining whether a pleading should be dismissed for failing to state a claim upon which relief can be granted.¹⁴ In *Bell Atlantic Corp. v. Twombly*,¹⁵ and *Ashcroft v. Iqbal*,¹⁶ the Supreme Court established that the heightened pleading standard requires a pleading to contain more than "naked assertions devoid of further factual enhancement."¹⁷ Rather, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."¹⁸ These standards serve to ensure that complainants put the opposing parties on sufficient notice of the actual claims at issue, and increase the likelihood that complainants have factual support for

¹² 39 C.F.R. §§ 3030.10(a)(1) and (a)(2).

¹³ FED. R. CIV. P. 8(a)(2).

¹⁴ FED. R. CIV. P. 12(b)(6).

¹⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

¹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁷ *Id.* at 678 (citing *Twombly*, 550 U.S. at 557).

¹⁸ *Id.*

their claims prior to expending the resources of the relevant tribunal and opposing parties. The same interests are served in the context of Commission complaints, and the Commission should follow the Supreme Court's holdings in *Twombly* and *Iqbal*.

Under these standards, the Complaint fails to allege any viable claim and must be dismissed.

A. Complainant Fails to Allege Any Factual Assertions Sufficient to Support His Claim that the August 2012 Revision of the Postal Operations Manual Constituted a Change in the Nature of Postal Services Requiring the Filing of a Request for an Advisory Opinion.

Complainant's allegations do not describe a nationwide change in service. Under 39 U.S.C. § 3661(b), "[w]hen the Postal Service determines that there should be a [nationwide] change in the nature of postal services[,]" it is directed to request an advisory opinion before implementation of the change in service. As the basis for his section 3661(b) claim, Complainant alleges that the revision of POM section 126.42 "eliminates the nexus between retail hours and the needs of the community."¹⁹ This contention, however, reflects an isolated review of POM section 126.42, and ignores other sections of the POM that apply to the establishment and modification of retail hours. Specifically, POM section 126.41, which applies to retail hours generally, including retail hours that are changed, states that "[t]he availability of retail services and lobby hours should reflect time periods that most appropriately meet the needs of

¹⁹ Complaint at ¶ 4. A revision to the POM, alone, does not constitute a change in service for purposes of section 3661. The POM revision under consideration in this docket is not substantive, but where there is a substantive POM revision that does not affect service, for example, a change in administrative process, the mere addition, amendment or removal of language from a Postal Service manual cannot constitute a change in the nature of postal services under section 3661 without some direction or guidance from Headquarters regarding utilization of the manual change to implement a change to actual postal services on a nationwide or substantially nationwide basis. See Advisory Opinion Concerning a Proposed Change in the Nature of Postal Services, Retail Analysis Program for Facilities Deployment, Docket No. N75-1 (April 22, 1976), at 29-30 (recognizing "that § 3661(b) is predicated upon the assumption that changes in the nature of postal services, however widespread or significant, must be the results of a 'determination' of the Postal Service in the form of a discrete managerial decision or program").

the majority of customers in the local area” and retail hours for stations and branches can be adjusted “to meet the needs of the local community.” Contrary to Complainant’s allegations, the Postal Service continues to operate pursuant to a policy that recognizes a strong “nexus between retail hours and the needs of the community,” and thus Complainant fails to identify a change in the Postal Service policy concerning the connection between retail hours and the needs of the community.²⁰

Furthermore, at its core, the instant controversy reflects Complainant’s concern over personal inconvenience that might arise from the reduction of retail hours at a handful of retail facilities in the San Francisco District. This, however, does not give rise to a “nationwide” or “substantially nationwide” change in service; instead, these allegations consist of a localized, geographically limited change. As such, given the small number of facilities involved and their limited geographical service areas, there is no basis for the Commission to find that the Postal Service has violated section 3661(b).²¹

B. Complainant Fails to Allege Any Factual Assertions Sufficient to Support His Claim that the Postal Service Violated 39 U.S.C. § 3661(a) as a Result of the August 2012 Revision of the Postal Operations Manual.

Complainant’s allegations do not describe a violation of 39 U.S.C. § 3661(a). First, Complainant’s allegations that the Postal Service violated section 3661(a) are based on a flawed statement of law. Paragraph 8 of the Complaint alleges that section

²⁰ Complainant’s failure to present a valid section 3661(b) claim is highlighted by the lack of factual assertions in support of his claim. Simply reciting the statute and the Commission’s rules does not establish an actionable controversy.

²¹ See Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches (March 10, 2010), at 2 (“If the full impact of [the Station and Branch Optimization] program had been limited to 162 disparate facilities, it would be unlikely to constitute a nationwide change in service.”).

3661(a) “requires the Postal Service to provide adequate and efficient postal service.”²²

While the Postal Service strives to provide adequate and efficient postal services, section 3661(a) requires the Postal Service to “develop and promote adequate and efficient postal services.”²³ Thus, in order to establish a section 3661(a) violation, Complainant must allege that the Postal Service has failed to develop and promote adequate and efficient postal services. However, the Complaint contains no such allegations and lacks any factual assertions in support. Rather, Complainant has omitted any reference to those key words. As such, his allegations are insufficient to establish a section 3661(a) violation.

Second, even if the Complainant’s interpretation of section 3661(a) is correct, the Complaint lacks sufficient factual claims and assertions to support a finding that the Postal Service is not providing adequate or efficient service. Complainant argues that as a result of the August 2012 POM revisions, the Postal Service no longer has a policy to ensure that retail hours provide adequate and efficient postal services.²⁴ As previously discussed, Complainant evaluated the August 2012 revision to section 126.42 in a vacuum and failed to recognize the other POM sections that apply to the establishment of retail hours. For example, POM section 126.41 provides that “[t]he availability of retail services and lobby hours should reflect time periods that most appropriately meet the needs of the majority of customers in the local area.”²⁵ Thus,

²² Complaint ¶ 8. Under Complainant’s interpretation of section 3661(a), both the Postal Service and the Commission would be inundated with complaints where individuals merely disagree with a Postal Service determination of what constitutes adequate and efficient service, much like the present complaint.

²³ 39 U.S.C. § 3661(a).

²⁴ Complaint ¶ 11.

²⁵ Postal Bulletin 22344 at 17 (Aug. 23, 2012). Prior to the August 2012 revision, section 126.41 read “Schedule retail services and lobby hours during hours that most appropriately meet the needs of the majority of customers in the local area.” Postal Bulletin 22289 at 9 (July 15, 2010).

even after the August 2012 revision, Postal Service regulations recognize the importance of considering customer needs when determining adequate and efficient retail hours.

Furthermore, Complainant fails to identify or address numerous Postal Service operated retail facilities with P.O. Box service and window hours that extend beyond 5:00 p.m., including the Golden Gate Station, open until 5:30 p.m., the Clayton Street Station, open until 5:30 p.m., and the Pine Street Station, open until 6:00 p.m. Moreover, by limiting his definition of the “postal services” to the establishment of retail hours at Postal Service-operated retail facilities, Complainant ignores the abundant alternative access channels in the San Francisco District, including Contract Postal Units (CPUs), Village Post Offices (VPOs), stamp consignment retailers, and postal operations at Staples locations.²⁶ This expanded network of postal services is further supplemented by postal services available from carriers. Complainant does not allege that the August 2012 revision impacts the availability of services through any of these additional sources.

II. COMPLAINANT’S ALLEGATIONS THAT THE POSTAL SERVICE VIOLATED CERTAIN PROVISIONS OF THE POSTAL OPERATIONS MANUAL ARE NOT COGNIZABLE CLAIMS UNDER THE COMMISSION’S COMPLAINT AUTHORITY.

Complainant’s arguments allege non-compliance with POM section 126.42, including a failure to adequately display signs at some Post Offices, and, on some posted signs, the omission of language directing customers to the nearest Post Office that can provide retail service outside of the new hours of operation.²⁷ However, the

²⁶ A complete list of available Postal Service operated facilities and alternate access locations, with hours of operation, is available at usps.com.

²⁷ Complaint ¶¶ 13-29.

Complainant's allegations regarding compliance with the POM do not fall within the Commission's jurisdiction.

The Commission's authority to adjudicate complaints, which is set forth in 39 U.S.C. § 3662(a), allows an interested person to bring a complaint when "the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404(a), 601, or [chapter 36] (or regulations promulgated under any of those provisions)."²⁸ In the instant action, Complainant cites no statutory basis for his POM violation claim, let alone one of the enumerated sections granting the Commission jurisdiction. Instead, paragraphs 13 through 28 of the Complaint allege that the Postal Service has violated section 126.42 of the POM. However, as the POM is not one of the specifically enumerated provisions in section 3662(a), Complainant has no basis to seek Commission relief.

The legislative history behind the Commission's complaint authority provides further support for the fact that the Commission lacks jurisdiction to hear complaint cases regarding alleged POM violations. Specifically, the legislative history of the Postal Accountability and Enhancement Act of 2006 (PAEA) indicates that Congress did not intend to broaden the Commission's complaint jurisdiction to include matters outside of the enumerated provisions. Notwithstanding the provisions it may have included within the Commission's complaint jurisdiction, Congress intended to focus the Commission's efforts on certain rate and service controversies, and avoid exposing the Postal Service to challenges aimed at other internal aspects of Postal Service operations. Legislation originally considered and passed by the House gave the

²⁸ 39 U.S.C. § 3662(a).

Commission much broader jurisdiction over complaints concerning the entirety of chapters 1, 4, 6, and 36 of Title 39.²⁹ But when the Senate approved S. 662 (styled as an amendment to H.R. 22), it changed this language by limiting the Commission's jurisdiction to "the provisions of chapter 1 (except section 101(c)), sections 401, 403, 404, 404a, 601, or this chapter [chapter 36]."³⁰ One of its key sponsors explained that this change –

does not and is not intended to preclude any interested party from securing a hearing before the Postal Regulatory Commission if it believes that the rates being charged or the manner in which services being provided to that mailer or mailer group violates the act. It is my hope that in conference [w]e can work to assure that the Postal Regulatory Commission does not become embroiled in attempts to resolve disputes as to internal affairs or purely operational decisions of the Postal Service. This provision is intended to protect the rights of the mailing public against the potential for monopoly abuse or other unjust or unfair conduct by the Postal Service in terms of rates charged or the nature of service provided.³¹

Congress chose to limit the Commission's authority even further in H.R. 6407, which was eventually passed as the PAEA.³² In that legislation, Congress limited the Commission's complaint authority over chapter 1 to include only section 101(d), and restricted the scope of its complaint jurisdiction in sections 401 and 403 to a single specified subsection in each statute.³³ Moreover, Congress eliminated complaint jurisdiction over section 404 entirely.

The statutory context and legislative history therefore indicate that jurisdiction is limited and that having jurisdiction over "rules or regulations" of the Postal Service does

²⁹ See, e.g., H.R. 22, 109th Cong. § 205 (2006); S. 662, 109th Cong. § 205 (2006).

³⁰ S. 662, 109th Cong. § 205 (2006).

³¹ 152 Cong. Rec. S767 (daily ed. Feb. 7, 2006) (statement of Sen. Collins) (emphasis added).

³² Postal Accountability and Enhancement Act, H.R. 6407, 109th Cong. (2006).

³³ *Id.* at § 205.

not extend to all such rules or regulations.³⁴ It follows that complaint jurisdiction does not extend to the POM.

To the extent that Complainant may be relying on 39 U.S.C. § 401(2) for the proposition that the POM is a regulation which may be challenged as being inconsistent with title 39, this argument also fails.³⁵ Section 401(2) provides one of the general powers granted to the Postal Service by Congress, specifically the power “to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title”³⁶ While a violation of this section is one of the enumerated bases for an interested person to bring a complaint before the Commission, Complainant has not relied upon section 401(2) in his analysis and the allegations in the Complaint are not so reasonably related to section 401(2) to form the basis for any such claim.

In addition, section 401(2) only applies to the adoption, amendment and repeal of Postal Service rules and regulations. In the instant claim set forth in Complaint paragraphs 13 through 29, Complainant alleges a substantive violation of the policies in the POM, not in the procedures of adoption, amendment or repeal of sections of the POM. Such a claim regarding a substantive violation of the POM is not cognizable pursuant to section 401(2). In fact, the authority of the Postal Service to adjust retail hours is authorized by 39 U.S.C. § 404(a)(3), which is not one of the enumerated

³⁴ See, e.g., *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) (“A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”).

³⁵ Complainant makes no reference to section 401(2) in his Complaint. Nevertheless, the Postal Service will set forth why any potential argument based on section 401(2) also fails to state a claim, in order to foreclose any possibility that Complainant attempts to rely upon this section at a later time.

³⁶ 39 U.S.C. § 401(2).

provisions in section 3662(a) providing a basis for Commission jurisdiction to entertain a complaint.

Moreover, even if a violation of a regulation were cognizable under section 401(2), Complainant also would be required to show how the regulation and its potential violation are inconsistent with the other sections of title 39 enumerated in section 3662(a). Complainant, however, has made no logical argument that POM section 126.42 violates any section of title 39. Nor has he even argued that the alleged POM violations are contrary to any provisions in title 39, let alone those enumerated in section 3662(a). Instead, Complainant simply alleges that the posting dates for the public notices and the substance of such notices were insufficient. Any such alleged insufficiency is not a violation of any section of title 39.

For example, in paragraph 29, Complainant states that the adjustment in retail hours “will not provide customers adequate and efficient postal services.” This alleged standard, presumably taken from 39 U.S.C. § 3661(a), however, does not fairly reflect the statutory text and cannot be the basis for a title 39 violation. Instead, as explained in section I.B *supra*, section 3661(a) states that “[t]he Postal Service shall develop and promote adequate and efficient postal services.” Complainant has not alleged that the Postal Service has failed to develop and promote adequate and efficient postal services. In fact, he has made no allegations regarding the Postal Service’s attempts to develop or promote postal services; he has instead ignored those key words and placed a statutory burden on the Postal Service where none exists. As such, Complainant’s alleged statutory violations in paragraphs 8-12 of the Complaint fail to establish a section 3661(a) violation, and thus, fail to support any potential section 401(2) claim.

Ultimately, to find any basis for jurisdiction over allegations regarding compliance with the POM, the Commission must read into the Complaint facts that are not alleged, legal bases that are not presented, and analysis which simply does not exist. The Commission should not set out to perform what Complainant has failed to do.³⁷

III. THE COMMISSION SHOULD REFER THE COMPLAINT TO THE RATE AND SERVICE INQUIRY PROCESS PURSUANT TO 39 C.F.R. § 3030.13.

If the Commission does not dismiss the Complaint for the reasons set forth above, the Commission should refer the Complaint to the Postal Service for resolution through the rate and service inquiry process. The Commission established regulations that provide a means to address issues raised by Postal Service customers that are limited in scope and may be addressed most effectively through informal means with the Postal Service. Specifically, 39 C.F.R. § 3030.13(a) states:

(a) This section applies to complaints that concern rate or service matters that are isolated incidents affecting few mail users provided that the complaint does not either:

- (1) Raise unfair competition issues;
- (2) Raise issues affecting a significant number of mail users;
- (3) Represent a pattern, practice, or systemic issue that affects a significant number of mail users (or is reasonably likely to be evidence that such a pattern has begun); or
- (4) Impact a substantial region of the nation.

³⁷ To the extent that the Complainant is alleging that the POM compliance issues are related to another statutory provision that is covered by section 3662, the Commission should dismiss these allegations as insufficient per the Commission's Rules of Practice and Procedure. See 39 C.F.R. § 3030.10(a)(2). A complaint must clearly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements, and it must include citations to the relied-upon section or sections of Title 39 of the United States Code, or the relied-upon order, regulation, or other regulatory requirement. *Id.* In describing his allegations of POM violations, the Complainant fails to allege any violation of the Act, and thus does not present a valid claim. The Commission's rules are not mere technicalities; rather, they are designed to ensure that the Postal Service and the Commission have fair notice of the precise nature of the complaint at hand, so that they might properly analyze and address it.

In this case, the allegations of the Complaint have a limited application to only approximately 25 retail facilities in the San Francisco District, and relatively few mail users. The Complaint does not raise issues that implicate unfair competition; that affect a significant number of mail users; that represent a pattern, practice or systemic issue that may impact a significant number of mailers; or that impact a substantial region of the country.³⁸

Specifically, Complainant makes no claims of unfair competition under 39 U.S.C. § 404a. The Complaint is also limited in scope to potential business and individual customers utilizing approximately 25 retail facilities in a discrete region of one state where challenged closing hour adjustments reflect customer needs. As such, the factual situation alleged in the Complaint is unlikely to affect a significant number of mailers and does not impact a substantial region of the country. Furthermore, the Complaint contains no allegations that the Postal Service's actions represent a pattern, practice or systemic issue that may impact a significant number of mailers. Ultimately, if the Complaint is not dismissed, in order to resolve this issue outside of the formal Complaint process, the Commission should refer the Complaint to the rate and service inquiry process, whereby the Postal Service will, within 45 days, report to the Commission regarding whether the issues were resolved.

³⁸ See 39 C.F.R. § 3030.13(a)(1)-(4).

Conclusion

For the reasons set forth above, the Commission should dismiss the Complaint with prejudice, or in the alternative, refer the Complaint to the Postal Service as a rate or service inquiry pursuant to 39 C.F.R. § 3030.13.

Respectfully submitted,

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